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IN THE

Supreme Court of the United States

October Term, 1981

KENNETH L. McLEOD, D.V.M.

Petitioner,

v.

KENNETH CHILTON, LAWRENCE BECK, ROBERT BOWMAN, DWAYNE DOBSON, DON MARTIN and KENNETH MORRISON, individually and as members of THE STATE OF ARIZONA LIVE STOCK SANITARY BOARD; JOSEPH SAMSILL; WAYNE WIEKHORST, D.V.M.; and THE STATE OF ARIZONA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA DIVISION ONE

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To The Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

KENNETH L. McLEOD, D.V.M., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the State of Arizona, Division One, entered January 27, 1982.

QUESTION PRESENTED

Whether a public employee who is dismissed for reasons likely to harm his reputation and foreclose future employment opportunities loses his right to a hearing where those reasons are made public as a result of his exercising his right to have all proceedings and meetings concerning his dismissal made open to the public.

PARTIES

The parties to this proceeding are those listed in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, and is printed at Appendix A, *infra*, pp. 1a through 21a. The findings of fact, conclusions of law, and order of the Maricopa County Superior Court are not reported but are printed at Appendix B, *infra*, pp. 22a through 25A.

JURISDICTION

The opinion of the Court of Appeals was filed November 10, 1981. A timely petition for rehearing was denied on January 27, 1982 (Appendix C, *infra*, p. 26a), and the Arizona Supreme Court denied a timely petition for review on February 23, 1982 (Appendix D, *infra*, p. 27a The jurisdiction of this Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. CONS. amend. I, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. U.S. CONS. amend. XIV, § 1, provides, in part:

". . . No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. A.R.S. § 38-431.01(A) provides:

"All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings."

4. A.R.S. § 38-431.03 provides, in part:

"A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of a public officer, appointee or employee of any body, except that with the exception of salary discussions, an officer, appointee or employee may demand that such discussion or consideration occur at a public meeting."

STATEMENT OF THE CASE

For 23 years, Petitioner KENNETH L. McLEOD, D.V.M., served as Chief Veterinary Meat Inspector for the Arizona State Live Stock Sanitary Board. As such, he was in charge of Arizona's meat inspection program, in a position created by statute, A.R.S. § 24-621. He served without difficulty and with adequate job ratings until late June of 1979, when he was told that he had a choice of resigning, taking a demotion, or having "bad charges" made against him. He refused, but instead formally requested the Live Stock Board to hold all discussions about his employment at public open meeting. He has this right under Arizona Law, A.R.S. § 38-431.03(A)(1) (quoted *supra*).

DR. McLEOD was terminated by Board Action on August

22 and August 30, 1979. As part of the proceedings, he was given a dismissal letter charging, *inter alia*, (1) that he had allowed "unwholesome and diseased meat to move to human consumption"; (2) had "a direct conflict of interest" in violation of Arizona law (A.R.S. § 38-503); and, (3) suffered from "incompetence", "neglect of duty", "insubordination" and other similar problems.

Although DR. McLEOD requested a hearing to respond to the charges, he did not receive one.* He therefore filed suit, based, in part, on 42 U.S.C. § 1983. He alleged that the Board had deprived him of his liberty and property without due process of law. See proceedings in Maricopa County, Arizona, cause number C-393927, discussed at Appendix A, p. 5a.

After a hearing on a preliminary injunction, the trial court entered findings of fact and conclusions of law (Appendix B, pp. 22a through 25a, *infra*). The court ordered Dr. McLeod reinstated pending an anticipated personnel board hearing. As part of those proceedings, the trial court specifically found that the allegations behind the dismissal carried "a taint of unethical conduct" and "may be causing injury" to Dr. McLeod's reputation. (Appendix B, p. 24a).

In Opinion filed November 10, 1981, the Arizona Court of Appeals reversed the trial court's order and held that Dr.

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*Almost a year later the Board did offer Dr. McLeod a "hearing", supposedly to allow him to clear his name. Although that hearing was held, its validity and fairness are at issue in subsequent judicial proceedings. The Board now argues that there can be no judicial review of that hearing, because it need not have been held in the first instance. See proceedings now pending in the Court of Appeals for the State of Arizona, Division One, Cause No. 1 CA-CIV 6018. This "hearing" was never before the court of appeals when it entered the decision which concerns us herein.

McLeod was not entitled to any type of hearing. He was not entitled to a personnel board hearing, the Court held, because he was an "at will" employee. (Appendix A, pp. 10a through 21a).

The court then held that the United States Constitution does not require that Dr. McLeod be given a "due process" hearing. (Appendix A, pp. 18a through 21a). Although the Court of Appeals recognized that a person is entitled to such a hearing "where the dismissal imposed upon the employee a stigma or reputational harm which forecloses further employment opportunities or results in significant damage to the employee's standing in the community", (Appendix A, p. 19a), the court nonetheless found that law inapplicable to Dr. McLeod. The court's reasoning was that Dr. McLeod himself had caused the reasons for the dismissal to be made public:

> "The contents of the [dismissal] letter and the reasons for plaintiff's dismissal were not made public until after plaintiff's *request* that all discussions involving his dismissal be had in public." (Appendix A at p. 20a; emphasis the Court's).

This Opinion was approved by the Arizona Supreme Court on February 23, 1982 when it refused to grant a timely Petition for Review (Appendix D, p. 27a).

Thus, by exercising the right to have his employment discussed at public meeting, Dr. McLeod lost any right he otherwise would have had to a hearing to clear his name.

REASONS FOR GRANTING WRIT

Introduction

This case presents a direct conflict between the right of a

public employee to have a hearing when dismissed for publicized defamatory reasons, with the right of the public to have meetings of its boards held open to scrutiny. As a corollary, this case raises the question of the foundation and constitutional basis of the "Sunshine Laws" that have been promulgated by every state and the United States Congress.

This Court should accept certiorari because the Arizona Court of Appeals has decided important federal questions concerning these matters which should be settled by this Court, and because there is an apparent conflict between two federal courts of appeals on one aspect of this matter.

The Liberty Interest Right To A Hearing

The Court of Appeals rejected Dr. McLeod's plea for a hearing, by saying that it was he who caused the Live Stock Board to publicize the reasons for the termination. This is contrary to the generally accepted rule that Dr. McLeod would have been entitled to such a hearing if the Board had publicized the termination reasons absent Dr. McLeod's request for public meetings.

The right of a public employee to a hearing when dismissed for defamatory reasons has been well established and is grounded on the Liberty Interest afforded under the 14th Amendment of the United States Constitution. As this Court said in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1972):

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

This Liberty Interest was further clarified in *Board of Regents v. Roth*, 408 U.S. 564 (1972), where this Court

found that the State, in declining to rehire Teacher Roth:

> "Did not make any charge against him that might seriously damage his standing and associations in the community," (408 U.S. at 573)

nor did the State impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." (408 U.S. at 573).

Subsequent lower court decisions have interpreted the guidelines articulated in *Roth* to require that an employee claiming an infringement of liberty show that the government's action was likely to either seriously harm his standing in the community or foreclose his future opportunities for reemployment. *See, e.g., Weathers v. West Yuma County School District*, 530 F.2d 1335, 1338-39 (10th Cir. 1976); *Sims v. Fox*, 505 F.2d 857, 863 (5th Cir. 1974 [en banc]); *Lipp v. Board of Education*, 470 F.2d 802, 805 (7th Cir. 1972).

Equally well established is the requirement that the State must make its actions public before any Liberty Interest attaches. As recognized in *Bishop v. Wood*, 426 U.S. 341 (1976), an "at will" public employee is not deprived of liberty "when there is no public disclosure of the reasons for the discharge". (426 U.S. at 348). See, also, *Codd v. Velger*, 429 U.S. 624, 628 (1977).

The nature and extent of this "public disclosure' appears nebulous from the few courts that have dealt with the issue. Some courts have held that placing defamatory matter in a personnel file likely to be divulged is sufficient disclosure. *Stevens v. Joint School District No. 1*, 429 F. Supp. 477 (W.D. Wis. 1977); see, also, *Mazaleski v. Trewsdale*, 562 F.2d 701 (D.C. Cir. 1977). Other courts have found this disclosure where a terminated employee is "forced" to cause

the disclosure in the first instance. *Giordano v. Roudebush*, 448 F. Supp. 899, 906 (S.D. Iowa 1977) (doctor "forced" to consent to disclosure to obtain future employment); *Doe v. Anker*, 451 F. Supp. 241, 252 (S.D.N.Y. 1978) (plaintiff "forced to consent to being defamed before his doctor as a condition to obtaining an explanation for his suspension").

The precise issue at bar involves only one aspect of this public disclosure: where the disclosure occurs because the employee requests a public meeting concerning his termination. It appears that this question has been dealt with in only three cases: *Cato v. Collins*, 539 F.2d 656 (8th Cir. 1976); *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338 (5th Cir. 1978); and *McLeod v. Chilton*, ___ Ariz. ___, ___ P.2d ___ (App. 1982) (*sub judice*).

Both the 8th Circuit and the Arizona courts have held that disclosure through an open meeting held at an employee's request cannot form the basis for a Liberty Interest hearing:

> "In this case, the record indicates that the reasons for the non-renewal of appellant's contract were not publicized by the board nor incorporated into any employment record. The board informed appellant of the reasons for non-renewal in a confidential letter and did not publicly announce those reasons. It was only at appellant's request that public hearings were held, where the circumstances surrounding and the reasons for non-renewal became public information. Such disclosure of the reasons for nonrenewal at the teacher's request cannot from the basis for an interest in liberty."

539 F.2d at 660; quoted with approval by the Arizona Court of Appeals (Appendix A, p. 20a).

The Fifth Circuit, on the other hand, has ruled that it makes no difference whether the charges are aired at a public meeting held at the request of the terminated employee.

In *Dennis v. S & S Consolidated Rural H.S. District, supra*, teacher Dennis requested his Board of Trustees to meet publicly. Prior to that meeting, Dennis had not been given a list of charges against him or reasons for his non-renewal. The Board met at Dennis' request and aired charges which included drinking. The Fifth Circuit held that Dennis was entitled to a hearing in order to "clear his name". (577 F.2d at 344). Dennis was entitled to a hearing because the charges against him had been made public, regardless of the cause:

> "[I]n [*Ferguson v. Thomas, supra*], we recognized a place for the making of private, though damaging, charges against an employee who elects to depart rather than air them. *Simms v. Fox*, 505 F.2d 857 (5th Cir. 1974) also recognizes, however, that where such public charges are denied and discharge is resisted, they may not be the basis of discharge unless due process has been accorded." (577 F.2d at 341).

Thus, the Fifth Circuit is at odds with the Eighth Circuit as to the significance of an employee's request that the charges be made public with respect to the right of a due process hearing.

The Sunshine Laws

According to both the Arizona Courts and the Eighth Circuit, McLeod lost his right to a "Liberty Interest" hearing by exercising his right to have the charges aired at a public meeting. The problem is that his right to a public meeting is (or should be) a fundamental Constitutional right. As such, he should not be punished for its exercise absent a compelling state interest.

This Court has apparently never considered the nature of the right of the public to require meetings of its boards to be held openly. This may be because of the extensive legislation

codifying the right. Thus, the last twenty years have brought substantial legislative changes with respect to requiring governing bodies to open their meetings to public scrutiny. Every state has now passed some form of "Sunshine Law" as has the United States Congress (see listings in Note, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Valp. L. Rev. 295 (1980)

There is no question that these open meeting statutes serve an important purpose:

> "They are instrumental in fostering an informed public, thereby promoting greater citizen participation in the affairs of government and greater understanding of the decisions reached by government. By allowing the public to better oversee government operations, they make the government responsive and responsible. Abuses of the public trust can more readily be discerned and corrected. Accurate and adequate information facilitates constructive criticism of the government, and can assist in improving the quality of the work. By reducing public suspicion and distrust which is bred of excessive secrecy, citizen confidence in government is promoted."

Edelstein, *Openness in Government - a Continuing Era*, 38 Fed. B.J. 95, 96 (1979).

Beyond having significant impact, the right to a public meeting is firmly entrenched in the Constitution. Thus, many commentators have argued for years that the right to require open meetings of public boards is a fundamental right guaranteed by the First Amendment. Cross, *the People's Right To Know*, 124-32 (1953); Thayer, *Legal Control of the Press*, 164-68 (4th Ed. 1962); Parks, *The Open Government Principle: Applying The Right To Know Under The Constitution*, 26 Geo. Wash. L. Rev. 1 (1957); Note, *Access To Official Information: A Neglected Constitutional Right*, 27 Ind. L.J. 209 (1952); Note, *Open Meeting Statutes: The*

Press Fights For The Right To Know, 75 Harv. L. Rev. 1199, 1204 (1962).

As so aptly stated by Cross, *supra*, 132:

> "The public's business is the public's business. The people have the right to know. Freedom of information about public records and proceedings is their just heritage. Citizens must have legal right to investigate and examine the conduct of their affairs. They must have a simple, speedy means of enforcement. These rights must be raised to the highest sanction. The time is ripe. The First Amendment points the way."

There is also some judicial authority, although scant, for the proposition. The California Supreme Court has labeled the right of access to government records a "fundamental" right based on the First Amendment. *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974):

> "Access to Government records is doubtless a fundamental interest of citizenship. Legislative and judicial vigor in protecting this interest may have played a role in postponing delineation of a Constitutional right of access. This delineation may await a future clash of demands for disclosure with claims of executive secrecy, both posited on Constitutional grounds."

(42 Cal. App. 3d at 654; 117 Cal. Rptr. at 111). See, also *Pell v. Procunier*, 417 U.S. 817, 839 (1974) (Dissenting opinion).

If this Court allows the Arizona courts and the Eighth Circuit to continue to deny hearings when termination reasons are discussed at requested public meetings, the action will invite a substantial chilling effect on First Amendment rights. Such rulings discourage terminated employees from exercising the fundamental First Amendment right of having board actions open to public scrutiny. Such holdings would also have an effect on the operation of government, since they

encourage closed board meetings.

On the other hand, if an employee does request that proceedings concerning his employment be by way of open meeting, this will allow the administrative agency an opportunity to declare "open season" on that employee's reputation, without fear of reprisal. The board, knowing it will not have to withstand a liberty interest hearing, will be free to defame the terminated employee without scrutiny.

In sum, we believe this Court should address the significance of "Sunshine Laws" viz-a-viz a terminated and defamed public employee's right to a liberty interest hearing. This Court should establish the fundamental basis of the right to open board meetings not only for the good of Dr. McLeod, but also for the good of truth and fairness in the management of our government.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 25th day of May, 1982.

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